In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 487

NORTH COUNTIES HYDRO-ELECTRIC COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The unanimous opinion of the Court of Claims (Pet. App. 13-17) is reported at 151 F. Supp. 322. Its findings of fact and opinion (also unanimous) in an earlier case brought by petitioner (Pet. App. 18-37) are reported at 108 Ct. Cls. 470.

JURISDICTION

The judgment of the Court of Claims was entered on May 8, 1957. A timely motion for rehearing was

overruled on July 12, 1957. The petition for a writ of certiorari was filed on September 20, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether a prior judgment entered in 1947, dismissing a claim for just compensation because it was not shown that there was a taking of property by flooding as a result of the erection of a dam in 1932, is *res judicata* in relation to petitioner's present claim for an alleged taking by flooding from the same dam.

STATEMENT

Petitioner operates a hydro-electric power plant on the Fox River near Dayton, Illinois, about six miles upstream from the confluence of the Fox and Illinois rivers. In 1932, the United States built the Starved Rock Dam on the Illinois river, backing water up the Fox river about 2½ miles to a point some 3 miles below petitioner's plant. More than ten years later, an ice jam formed in the Fox River putting petitioner's plant out of commission for some six weeks in March and April of 1943. On several occasions between 1936 and 1946, ice gorges had reduced the effective power head of petitioner's dam for a short time.

Petitioner sued in the Court of Claims for an alleged taking, and in April, 1947, the court made findings of fact, concluded that the petitioner was not entitled to recover, and entered judgment accordingly. Ice formed in the river again in 1952 forcing a shut down of operations for 19 days. This suit was thereafter brought for the alleged taking of petitioner's plant. A Commissioner of the Court of Claims made findings favorable to petitioner and his report recommended

the entry of judgment for petitioner. The United States took exceptions on numerous grounds. The court below held that the first judgment was *res judicata* of this case and consequently found it unnecessary to pass upon other questions (though it did find that ice formed again and petitioner's plant was flooded in 1952) (Pet. App. 16-17).[1]

ARGUMENT

The doctrine of *res judicata* forbids relitigation of a claim that has been decided against a party for failure of proof. *Heiser* v. *Woodruff*, 327 U.S. 726, 735-736. That is all this case amounts to. The first case was not, as petitioner argues (Pet. 9-10), dismissed as premature. On the contrary, it had been brought ten years after the dam was put in operation and was dismissed for failure to prove either that the ice jams were caused by the government's dam *or* that there was sufficient proof of recurrence of flooding so as to constitute a taking of a flowage easement or imposition of a servitude on petitioner's property. The Court of Claims was plainly correct when it so construed its earlier decision (Pet. App. 14).

Petitioner's claim of conflict with *Portsmouth Co.* v. *United States*, 260 U.S. 327 and *United States* v. *Dickinson*, 331 U.S. 745 lacks merit. In the *Portsmouth* case, affirmative acts of the United States (mounting heavy guns after dismounting others, establishing a fire control station and service and additional firing) had taken place subsequent to the earlier litigation. It was the allegation of these facts which led the court

[1] Since the validity of the commissioner's findings was not passed upon, we do not accept the quotations made therefrom by petitioner (Pet. 3-4) as correctly stating the ultimate facts.

to hold that the claimant might establish the imposition of a servitude. No such situation is here presented. Petitioner does not rely upon any additions to or changes in the method of operation of the Starved Rock Dam. Thus, the only act of the United States which could constitute a taking was the erection and the placing in operation of the dam in 1932 and 1933.[2] The *Dickinson* case simply held that the limitation period for a suit for a taking would not commence to run until the pool behind the dam had reached its operating level. There was no question but that there had been a taking by flooding; only a problem as to when this taking occurred. Nothing in that opinion indicates a right to relitigate a claim of a taking as attempted by petitioner here. If one grants that the events of 1952 constitute some additional evidence of occasional flooding, petitioner still cannot escape a dispositive holding of the first case: that it had failed to show a causal relation between the construction of the Government dam on the Illinois River and the occasional ice jams below petitioner's dam on the Fox. Certainly, on that issue petitioner has had its full day in court.

[2] This suggests another defense, which the Court of Claims found it unnecessary to decide, i.e., that the six-year time limitation had long since expired.

CONCLUSION

There is no conflict of decision nor question warranting review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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